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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT DIVISION THREE

CRAIG LINDEN,

Plaintiff and Appellant,

v.

JOHN S. SIAMAS et al.,

Defendants and Respondents.

A091323

(San Francisco County Super. Ct. No. 989398)

Plaintiff Craig Linden sued John Siamas and the law firm of Jackson Tufts Cole & Black LLP (Jackson Tufts) for legal malpractice, breach of fiduciary duty, breach of contract and fraud arising from defendants' representation in an arbitration proceeding. The trial court granted summary judgment, ruling that defendants had shown plaintiff could not prove essential elements of his claims and that plaintiff had failed to produce competent evidence raising a triable issue of material fact. We affirm.

Background

Plaintiff invented a small-packaged cogeneration unit, a machine that consumes a fuel like natural gas and produces electricity and thermal energy. He developed the device through his company, Design Systems and Research Development, Inc. (DSRD) and its wholly-owned subsidiary, Micro Cogen, Inc. (MCI). In 1991 he sold DSRD and MCI to Proven Alternatives, Inc. (PAI). As a result of the transaction plaintiff became an employee of PAI and was to receive one-third of its net profits from foreign sublicensing transactions.

In February 1993 plaintiff petitioned to arbitrate alleged breaches of his purchase, license and employment agreements with PAI. Two years later he retained defendants to represent him in the arbitration. He had learned of Siamas and Jackson Tufts from his friend, Warren Davis, whom defendants were then representing in a suit against PAI.

The arbitration hearings began in July 1995 and continued for 26 days over the next 19 months, concluding in April 1996. Early in the representation Siamas restructured plaintiff's claims. In September 1995 he filed an amended pleading containing 16 claims for relief, 4 of which were later withdrawn for strategic reasons.

The panel issued its final award in September 1996. Plaintiff was awarded \$886,161 for breach of the license and purchase agreements, wrongful termination, and intentional infliction of emotional distress. The panel also awarded plaintiff \$100,000 in punitive damages and ordered PAI to pay arbitration costs. Plaintiff's remaining claims, including for attorneys' fees, were rejected.

The attorney-client agreement between plaintiff and Jackson Tufts by its terms terminated after the arbitration: "JTCB shall represent Client . . . in connection with a pending arbitration proceeding and shall prosecute Client's claims as necessary and in the manner JTCB deems best, through the settlement, arbitration, dismissal or other disposition of the prosecuted claims. . . . JTCB shall not have any obligation under this Agreement or otherwise to prosecute or represent Client in any appeal, rehearing or other post-arbitration matter based on Client's claims or to represent Client in any other matter" Siamas nonetheless offered to continue representing plaintiff at no additional charge after the arbitration so long as there were no actual or potential conflicts of interest between Jackson Tufts and plaintiff. Siamas was concerned that plaintiff wished to petition to "correct" the final award to include attorneys' fees, a strategy Siamas believed lacked merit, would delay and endanger plaintiff's ability to collect on the arbitration award, and could expose plaintiff to the risk of an award of fees in favor of PAI. Accordingly, he advised plaintiff in September 1996 that Jackson Tufts would help him confirm the arbitration award but could not appropriately seek to "correct" it.

Plaintiff instead retained new counsel to petition the court to add attorneys' fees to the final award. The trial court denied the petition and confirmed the award. In June 1997 plaintiff's new counsel negotiated a settlement requiring, inter alia, that PAI make monthly payments over the next two and one-half years. PAI filed for bankruptcy in June 1999, still owing plaintiff over \$600,000.

Plaintiff sued defendants for malpractice and related claims in September 1997. As later amended, the complaint alleged malpractice, breach of fiduciary duty, breach of contract and fraud. The court granted defendants' motion for summary judgment as to all claims, ruling that plaintiff "cannot prove essential elements of his causes of action for legal malpractice, breach of fiduciary duties, breach of contract, fraud and deceit, and claim for punitive damages" This appeal timely followed the ensuing judgment.

Discussion

Plaintiff challenges only the rulings on his claims for professional malpractice and breach of fiduciary duty. With respect to the former, he asserts the court erred in ruling he failed to show the existence of triable issues as to whether defendants negligently failed to (1) structure his claims so as to trigger insurance coverage that would protect him from PAI's eventual bankruptcy; and (2) obtain an attorneys' fee award from the arbitrators. He further asserts he presented triable issues as to whether defendants breached their fiduciary duties by (1) concurrently representing Davis; and (2) improperly terminating their representation after the arbitration hearings.

I. <u>Legal Standards</u>

"To secure summary judgment, a moving defendant may prove an affirmative defense, disprove at least one essential element of the plaintiff's cause of action [citations] or show that an element of the cause of action cannot be established [citations]. [Citation.] The defendant "must show that under no possible hypothesis within the reasonable purview of the allegations of the complaint is there a material question of fact which requires examination by trial." [Citation.] [¶] 'The moving

¹ This court affirmed the denial of plaintiff's petition in an unpublished opinion. (Linden et al. v. Proven

defendant bears the burden of proving the absence of any triable issue of material fact, even though the burden of proof as to a particular issue may be on the plaintiff at trial. [Citation.] . . . Once the moving party has met its burden, the opposing party bears the burden of presenting evidence that there is any triable issue of fact as to any essential element of a cause of action.' [Citation.]" (*Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1485.)

"In reviewing the propriety of a summary judgment, the appellate court must resolve all doubts in favor of the party opposing the judgment. [Citation.] The reviewing court conducts a de novo examination to see whether there are any genuine issues of material fact or whether the moving party is entitled to summary judgment as a matter of law. [Citation.]" (M.B. v. City of San Diego (1991) 233 Cal.App.3d 699, 703-704.) "We accept as true the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them. [Citation.] However, to defeat the motion for summary judgment, the plaintiff must show "specific facts," and cannot rely upon the allegations of the pleadings. [Citations.]" (Horn v. Cushman & Wakefield Western, Inc. (1999) 72 Cal.App.4th 798, 805.) "While '[s]ummary judgment is a drastic procedure, should be used with caution [citation] and should be granted only if there is no issue of triable fact' [citation], it is also true '[j]ustice requires that a defendant be as much entitled to be rid of an unmeritorious lawsuit as a plaintiff is entitled to maintain a good one.' [Citation.] 'A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail. [Citation.]' [Citation.]' (M.B. v. City of San Diego, supra, at p. 704.)

II. <u>Negligence</u>

The trial court ruled that defendants' evidence established they had not breached any duty of care or committed any negligence; that their conduct did not proximately cause plaintiff's damages; and that, as a matter of law, plaintiff's allegations were insufficient in that they constituted "second guessing" of litigation tactics. The burden

thus having shifted to plaintiff, the court sustained defendants' objections to substantial portions of plaintiff's opposing evidence² and ruled that plaintiff had failed to introduce competent evidence sufficient to raise any triable issues of material fact.

Plaintiff does not seem to dispute the trial court's finding that defendants met their initial burden of proof, arguing rather that his responsive evidence was sufficient to raise triable issues of fact as to both negligence and breach of fiduciary duty. We disagree. Turning first to his assertion that defendants should have structured his arbitration claims to trigger insurance coverage, we need only observe that plaintiff has not shown the existence of any PAI policy applicable to the purportedly covered claims. Plaintiff tries to rely on excerpts from his declaration to establish that he was a named insured on relevant PAI policies and that he sent defendants a certificate of insurance showing PAI had a Hartford Insurance Co. policy with \$2 million in general liability coverage. He also cites to his insurance expert's declaration as evidence that PAI's insurance polices would have covered the trade secret misappropriation, trade disparagement and defamation claims he asserts defendants should have raised. All of this "evidence," however, was ruled inadmissible in the trial court, and plaintiff has waived any challenge to those rulings by failing to raise them on appeal. "Although our review of a summary judgment is de novo, it is limited to issues which have been adequately raised and supported in plaintiffs' brief. [Citations.] Issues not raised in an appellant's brief are

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² "Plaintiff proffered the declarations of Craig Linden, Alvin H. Goldstein, Jr. and Harry L. Carter in opposition to Defendants' motion for summary judgment. Based on Defendants' objections to plaintiff's evidence, which were timely filed and served, the Court finds that significant portions of the declarations of Linden, Goldstein, and Carter contain inadmissible evidence. Specifically, Linden's declaration (including paragraphs 3-6, 8-9, 11, 13, 15-16, 18-24, 27-36, 39-43, and 45 and exhibits H-K, N, P, and Q) contains, *inter alia*, inadmissible hearsay, argument, improper legal opinions and conclusions, and information for which Linden has not established that he has personal knowledge. Goldstein's declaration (including paragraphs 3-6) contains purported expert opinion testimony that, *inter alia*, is premised improperly on facts neither shown to be true by admissible evidence nor based on hearsay of the type relied upon by experts in his field. Carter's declaration (including paragraphs 5-7 and 10-14) contains, *inter alia*, speculation, improper secondary evidence, and information for which the necessary foundation has not been laid."

deemed waived or abandoned. [Citation.]" (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.)³

Nor has plaintiff raised a triable issue regarding defendants' allegedly negligent failure to obtain attorneys' fees. While he concedes that defendants did seek fees in the arbitration, he asserts they negligently failed to cite two particular cases that, he claims, would have compelled the arbitrators to resolve the fee issue in his favor. Not so. Defendants having met their initial burden, plaintiff presented no competent evidence that they had a duty to cite these specific cases, that their decision not to do so fell below the applicable standard of care, or that the cited cases would have affected the outcome. His lay opinion that defendants should have cited these cases is patently incompetent evidence (Evid. Code, §§ 800, 803), and was properly excluded as such in the trial court.

Plaintiff's reliance on *Goebel v. Lauderdale* (1989) 214 Cal.App.3d 1502, 1508-1509 (*Goebel*) and *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1094-1095 (*Stanley*) is misplaced. In both those cases the alleged attorney negligence involved the attorney's "total failure to perform even the most perfunctory research;" in *Goebel*, moreover, the attorney advised the client to break the law. Under those circumstances, the *Goebel* and *Stanley* courts applied the rule that expert testimony is not necessary to establish malpractice if an attorney's negligence is readily apparent. (*Goebel*, *supra*, at p. 1508.) This, however, is not such a case. In contrast to both *Goebel* and *Stanley*, the only competent evidence here shows that defendants researched and briefed the attorneys' fees issue in the arbitration, and, further, that they had located and considered the cases plaintiff claims were controlling. Their decision not to cite that authority, without more, is not evidence of attorney malpractice.

³ Because plaintiff's failure to show applicable coverage precludes him from raising a triable issue of fact as to causation, we need not and do not address whether he proffered evidence that he possessed *viable* claims that would have been subject to such coverage; whether defendants had a duty to structure claims so as to trigger insurance coverage; or whether their alleged failure to pursue such claims was a tactical and strategic decision immune from liability.

III. Breach of Fiduciary Duty

Plaintiff contends defendants breached their fiduciary duties by (1) terminating the representation after the arbitration; and (2) concurrently representing his friend Warren Davis and Davis's company in a separate action against PAI. The trial court ruled that defendants' evidence established they did not breach any fiduciary duty; that their alleged conduct did not proximately cause plaintiff's injury; and that plaintiff failed to produce competent evidence to raise any triable issue of material fact.

A. Concurrent Representation

Plaintiff's contention that a conflict of interest arose from defendants' representation of Davis fails as a matter of law. While an attorney may not represent clients whose interests are *adverse* to each other without obtaining informed written consent (Rules Prof. Conduct, rule 3-310(C)),⁴ plaintiff supplies neither evidence nor authority for his proposition that representing two clients in separate proceedings against the same defendant, without more, constitutes a conflict of interest. Defendants, on the other hand, submitted expert evidence that rule 3-310(C) does *not* apply to the separate representation of two concurrent clients against the same adverse party in unrelated matters. Defendants' expert specifically opined that, absent a direct adverse interest not apparent here, the fact that both plaintiff and Davis were pursuing claims against PAI created neither an actual nor a potential conflict.

Plaintiff points to no countervailing expert evidence, but asserts Davis's interests were adverse to his own because defendants allegedly knew PAI was insolvent. In view of the limited assets available, he maintains, defendants' representation of Davis was adverse because "If the Defendants had successfully asserted my license rights there may have been nothing left for the Davis group." Analogizing the situation to bankruptcy or dual representation in settlement negotiations, he concludes, defendants' "duty of loyalty

⁴ Rule 3-310(C) provides: "A member shall not, without the informed written consent of each client: $[\P]$ (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or $[\P]$ (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or $[\P]$ (3) Represent a client in a matter and at the same

to the Davis action plaintiffs was inherently and totally irreconcilable with their duty of loyalty to him."

The analogy, and the assertion, lack merit. The record is bare of competent evidence that PAI had insufficient funds to pay either party's claim at the time of their respective settlement or final award, that PAI could not pay plaintiff's judgment when it was awarded in 1996, or that defendants knew at the time of the concurrent representation that PAI would be unable to pay both awards. Plaintiff's assertion that "If [respondents] had successfully asserted my license rights there may have been nothing left for the Davis group" is mere speculation insufficient to raise a material issue of fact. (*Vournas v. Fidelity Nat. Tit. Ins. Co.* (1999) 73 Cal.App.4th 668, 672.) While plaintiff cites allegedly contradictory "evidence" from his declaration and that of his legal expert, that evidence was ruled inadmissible in the trial court and plaintiff has not challenged that ruling on appeal. He may not, therefore, rely on the excluded evidence here. (*Reyes v. Kosha, supra*, 65 Cal.App.4th at p. 466, fn. 6.)

B. Abandonment

Plaintiff asserts that defendants breached their fiduciary duty to him by wrongfully terminating the representation after the arbitration award. This assertion, too, lacks legal and factual support. Although plaintiff claims defendants refused to pursue confirmation of the award in superior court, the record evidence establishes that the attorney-client agreement expressly excluded representation in any post-arbitration matters.⁵ In any event, competent evidence establishes that defendants in fact offered to continue the representation through confirmation of the award "as long as there is no actual or prospective conflict of interest" between their respective positions. Plaintiff, not defendants, declined to continue the representation on those terms, choosing instead to hire new counsel to attempt to "correct" the award to include an attorney's fees award.

time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter."

⁵ "JCTB shall not have any obligation under this Agreement or otherwise to prosecute or represent Client in any appeal, rehearing or other post-arbitration matter based on Client's claims or to represent Client in any other matter, . . ."

Nor were defendants ethically required to pursue such a "correction" of the award, an attempt they determined lacked legal merit and risked exposing defendant himself to liability for PAI's fees. (See Rules Prof. Conduct, rule 3-700(C)(1)(a).)

Plaintiff also asserts defendants wrongfully abandoned the representation in failing to promptly return all of his client papers as required by Rule 3-700(D) of the Rules of Professional Conduct.⁶ Again he cites no competent evidence to support this claim, relying primarily on discovery motions that were not offered in the trial court and are, accordingly, beyond the scope of our review. (*Doers v. Golden Gate Bridge Transp. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1; *Pulver v. Avco Financial Services.* (1986) 182 Cal.App.3d 622, 631-632.)⁷ His sole remaining factual support consists, once again, of testimony from his declaration ruled inadmissible in the trial court.

Faced with defendants' evidence that their withdrawal was consistent with their contractual and ethical obligations, plaintiff failed to meet his burden of presenting evidence showing any triable issue of fact as to this claim. (*Ochoa v. Pacific Gas & Electric Co., supra*, 61 Cal.App.4th at p. 1485.) The trial court correctly granted summary judgment.

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⁶ Under rule 3-700(D), an attorney whose employment has terminated must "promptly release to the client, at the request of the client, all the client papers and property. 'Client papers and property' includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not."

⁷ Finding no justification for plaintiff's failure to include these documents in his summary judgment opposition, we decline to judicially notice them. (See *Doers v. Golden Gate Bridge etc. Dist., supra*, 23 Cal.3d at pp. 184-185, fn. 1; *Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325-326.)

Disposition

The judgment is affirmed.		
	Corrigan, J.	
We concur:		
McGuiness, P.J.		
Parrilli, J.		